DR. RANJAN SINHA

v.

DR. P.C. HERMAN

HIGH COURT MALAYA, SEREMBAN
PEH SWEE CHIN J
[HIGH COURT CIVIL SUIT NO. 49 OF 1983]
14 DECEMBER 1987

PARTNERSHIP: *Issue of partnership - Evidence adduced to determine whether partnership exists - Oral agreement to form partnership - Whether written agreement is necessary - Whether tenancies of premises and assets forms part of partnership property.*

Both the defendant and the plaintiff are medical practitioners in an alleged partnership the existence of which was denied by the defendant but which was asserted to the contrary by the plaintiff. In this suit the defendant had sought a declaration that the plaintiff is a mere profit sharing partner and that such partnership on this basis be dissolved. Also, the defendant sought for an order that accounts be taken, appointment of receiver, injunction and damages.

The alleged partnership between the defendant and the plaintiff relates to their practice in four clinics located at Seremban, Mantin, Rembau and Rantau.

During the trial, the defendant testified that there was no partnership agreement between the defendant and the plaintiff. The plaintiff alleged that there was a discussion on the formation of a partnership between the defendant, the plaintiff and one Dr. Balram but when the plaintiff officially joined him, no partnership agreement was made. It was alleged by the defendant that if any partnership agreement exists it merely relates to the sharing of the profits of the practice but that there was no partnership on the assets and liabilities.

The defendant alleged that both the defendant and the plaintiff and Dr. Balram had agreed to form a partnership which was to commence on 1 July 1982. It was also agreed that if the partnership agreement was not ready, the partnership was to start on 1 July 1982 where the liabilities of the partnership were to be borne equally. It was also alleged by the plaintiff that on 17 November 1982 he had sent to the defendant a notice of termination of the partnership between him and the defendant.

Evidence was also adduced by both the defendant and the plaintiff for the purpose of determining whether the tenancies of the premises of the four clinics in Seremban, Rantau, Rembau and Mantin and its assets forms part of the partnership property or whether it belongs to either the defendant or the plaintiff personally. In particular was the premises at 96, Jalan Rahang, Seremban.

Held:

The Court declared as follows:

[1] that a verbal partnership in equal share in respect of medical practices carried on under the name and style of Leena Clinic in Rembau, Rantau, Seremban and Mantin had subsisted between the parties from 1 July 1982 until 18 November 1982 when it was dissolved.

[2] the partnership in the case of the medical practices at Rembau and Rantau was as to income only with equal liability to contribute to loss, if any.

[3] the tenancy in respect of premises at 96, Jalan Rahang Seremban, has been at all material times and still remain the personal asset of the plaintiff and on the termination of the

partnership between the parties on 18 November 1982 exclusive possession of the premises vested in the plaintiff. In the case of medical practices at Seremban and Mantin, such partnership was to include all assets in addition to just income and the same liability to contribute to any loss, if any.

[4] the tenancy in respect of the premises at Rantau and Seremban has at all material times been and still remain the personal asset of the defendant and exclusive possession vested in the defendant on 18 November 1982.

[5] the tenancy in respect of the premises at Mantin was a partnership asset until 18 November 1982 when it became the personal asset of the plaintiff when exclusive possession vested as from that date.

[6] the affairs of the partnership was to be wound up and it was ordered that the accounts and inquiries be taken before the Registrar of the Court and that any money certified to be due consequently to each party be paid within two months, and that both parties be at liberty to apply to the Registrar by consent only for the appointment of a Receiver.

[Order accordingly.]

Cases referred to:
Gian Singh & Co. v. Duraz Nahar [1965] 2 MLJ 12
Benlam v. Gray [1847] 136 ER 827

Legislation referred to:
Medical Act 1971, s. 20
Partnership Act 1961, ss. 32, 34

For the defendant - R.R. Sethu (A. Fernandez with him); M/s. Fernandez & Partners
For the plaintiff - J. Nadchatiram; M/s. J. Nadchatiram

JUDGMENT

Peh Swee Chin J:

Both the plaintiff and the defendant are medical practitioners involved in a great deal of acrimony arising out of an alleged partnership which, in evidence and submissions, the defendant has maintained, has never existed, and which the plaintiff has throughout asserted to the contrary.

It is pertinent to observe that in the prayers of his statement of claim, the defendant has sought, in the alternative, a declaration that the plaintiff is a mere profit-sharing partner and that such partnership on this basis be dissolved. The plaintiff also asks for accounts to be taken, appointment of receiver, injunction and damages. I will revert to this later.

Massive evidence was given and I ought to summarize the more relevant parts of the respective protagonists' evidence.

I shall deal with the plaintiff's evidence first. He said he had once worked for one Dr. Vethaguru whom he left in August 1980, buying over from the latter the latter's two clinics at Rembau and Rantau. He met the defendant who was then an army doctor, in December 1981 and asked him if he wished to join him in the plaintiff's medical practice. In January 1981, the defendant rang him to say he would join him at Rembau and Rantau. The defendant arranged for and obtained a transfer to General Hospital, Seremban, on 1 February 1982 and stayed with the defendant in the plaintiff's house from 2 February 1982 until May 1982. During the defendant's stay with the defendant, a partnership was mooted. The plaintiff contacted one Thomas Ong (DW1) to rent some premises in Rahang Road, Seremban. The plaintiff, the

defendant and the said Thomas Ong, son of the owner of the premises in Rahang Road, (Rahang), saw the said premises together. The plaintiff and the plaintiff agreed to one month's rent in advance, also a deposit of 3 months' rent, for the ground and first floor of the said premises, and a premium of RM18,000. The defendant took no part in the negotiation. Thomas Ong rang up, and the plaintiff said he supplied his personal particulars for the purpose of the tenancy agreement. Meanwhile the defendant who applied to United Asian Bank Bhd. for a loan told the plaintiff that the bank required him to disclose that he had the premises (for the proposed clinic). The plaintiff rang up Thomas Ong to accept the plaintiff as the tenant instead. It was the defendant who paid the 3 months' rent deposit and the one month's rent in advance, by cheque and cash. It was he, the plaintiff said, who had the Rahang premises renovated at his own expense. The plaintiff did not expressly say, he also paid the premium for the (tenancy of) premises. He said the Rahang clinic commenced business on 1 July 1982. When the defendant came to serve in General Hospital, Seremban, he assisted the plaintiff by manning the Rembau and Rantau clinics once in a while and was not paid for such services except for "dinner or few drinks". There was no written partnership agreement by 1 July 1982, neither had the plaintiff contributed one cent, but at that time, one Dr. Balram (PW3) was a partner, as he and Dr. Balram verbally only agreed to be partners.

On a date not mentioned, according to the plaintiff's evidence, a discussion took place in the defendant's house among the plaintiff, the defendant and Dr. Balram, where it was agreed the plaintiff would hold 51% of the assets and capital of the partnership and 49% was to be divided between the defendant and Dr. Balram, and that the defendant was to pay the plaintiff RM15,000 before 31 December 1982 and Dr. Balram to pay the plaintiff RM25,000 by August 1982 towards what the defendant referred to as "goodwill". He said further that profit of the partnership would be shared, as follows; the plaintiff and the defendant would be entitled to 35% each, and Dr. Balram, 30%, but the expenses for setting up Rahang clinic would be shared equally and that the plaintiff would hold the tenancy of Rahang premises in trust for the partnership but he never agreed to have the sum of RM16,000 payable by the defendant to come from the defendant's income from the partnership profit. He said the partnership was subject to a written agreement, not drawn up and signed then because the plaintiff was waiting for the defendant to resign from government service. It was agreed on 11 July 1982 that the plaintiff was to be the tenant for a clinic at Mantin in respect of which he paid the rent deposit and premium. He paid the cost of renovation of Mantin clinic too. The defendant officially joined him on 22 August 1982, and no partnership agreement was "done" because Dr. Balram left the partnership. Dr. Balram later filed a summons against both parties here. Both he and the plaintiff paid a total of RM8,800 to Dr. Balram, each paying ½ of it. He refused to sign a draft agreement (A22), of partnership among himself, the defendant and one Dr. Ramanee (recruited by him), prepared at his instance which was forwarded to the defendant and was rejected by the plaintiff through the defendant's lawyer's letter dated 13 November 1982 (A21).

He said further there was a bank account under the name of Leena Clinic of which he was the sole signatory and into which cheques were paid. The cheque (for the sum of RM6,306) from Champion Electro-Medical Sdn. Bhd. was paid into this account. He said he was running short of money because the defendant and the other doctor did not pay him a single cent. The salesman in question suggested that the plaintiff should mark up the price of the said items for the purpose of the leasing agreement in respect of the items to be bought from him. On being assured that it was legal, the plaintiff asked the salesman to send new invoices with original prices and markedup prices to him. The sum of RM6,306 was paid into Leena Medical Centre's account. He then gave evidence of various sums of money he spent on employees, doctors, wiring, rent and drugs, etc.

The defendant, he said, took a loan from the United Asian Bank and opened an account with them. The plaintiff said his wife was one of the guarantors.

The plaintiff further said it was not true that he had refused to open a joint account with the plaintiff because "goodwill" money was not paid, secondly, partnership deed was not signed and thirdly it was never decided who the banker should be. He then referred to a bank statement of his (P6) and explained the entries.

The plaintiff then referred to a letter (A30) from the defendant's solicitors, dated 18 November 1982 terminating the partnership under the name of "Leena Medical Centre" between the plaintiff and the plaintiff. The plaintiff said he disagreed with the said termination of partnership for two reasons, first the plaintiff had not brought into the partnership the said "goodwill" money, and secondly the reasons given under para. (a), (b) and (c) in the said letter of termination were not true.

The plaintiff next referred to a police report lodged by him about fearing a breach of peace to be caused by the plaintiff if the defendant carried out his threat to evict him from the Rahang Clinic, because also on a previous occasion, the defendant had been unruly.

The plaintiff next referred to negotiation between himself and the plaintiff and he sent to the defendant another draft of partnership agreement which the plaintiff said the plaintiff was on the verge of being signed. It was not signed because differences arose on 28 December 1982 when he left until he came back on 5 January 1983 when there was an argument between him and the plaintiff and the plaintiff came to consultation room with a "well-built" Chinese, when a patient was there at the same time to see the plaintiff. The plaintiff said the defendant in a threatening voice told him he was not to see the patient and was to leave the clinic (Rahang Clinic) and never to return. The plaintiff left to avoid any unpleasantness. He denied that he even agreed to allow the defendant to take over the Rahang Clinic, to "split" the Mantin Clinic with him, and he himself (the defendant) was to take over Rembau and Rantau Clinics.

On 7 January 1983 he went back to the Rahang Clinic after informing the OCPD Seremban of his intention to make photo copies of bills and to take away his cassette recorder, the said OCPD's advice was that he returned the bills to Rahang Clinic. There were two books of accounts, one was P4 and the other book was last seen by him on 5 January 1983, and which he found missing in May 1983.

In cross-examination, the plaintiff denied that the agreement (A2) between him and his former employer (Dr. Vethaguru) restrained him from setting up a medical practice in Seremban. He agreed that the tenancy agreement in respect of Rahang clinic was signed by the plaintiff (as tenant) and there was no trust deed signed by the plaintiff in respect of the tenancy. He agreed that the rent receipt and receipt from the deposit of 3 months' rent were issued in the defendant's name. The plaintiff said however, it was he who paid the rent and the deposit but he said there was an "IOU" chit signed by the defendant to pay the premium to the landlord. The plaintiff denied giving a loan or RM11,547 to the defendant, but he admitted giving the defendant a loan of only RM2,000 for the defendant's life insurance premium. He denied having told Thomas Ong that he would report the payment of premium (for the Rahang tenancy) to the Income Tax department. He denied that the plaintiff had applied for a transfer to Seremban at his request. He said it was agreed that Dr. Balram would pay RM25,000, the plaintiff RM15,000 towards "goodwill" money for the purpose of partnership, and that profit would be shared on the basis of 30% for Dr. Balram and 35% each of the defendant and the defendant respectively, but there was no partnership on "assets or liabilities" even if the

"goodwill" money was paid. He said Dr. Balram and the plaintiff had not become partners because the said "goodwill" money was not paid; and secondly the partnership agreement had not been signed. He said that the tenancies of both Rembau and Rantau clinics were brought into partnership. He said the defendant was supposed to hold tenancy of Rahang clinic in trust (for the partnership). He said books of account were kept by him and P4 was one of such accounts books. A partnership bank account was to be opened and he had opened an account in the name of Leena Medical Centre. There were 2 books of account, P4 and another one which was missing. He denied Dr. Balram and the defendant had no access to them or that he had taken (kept) the missing account book. The defendant and Dr. Balram handed him the daily collections with a slip signed by the nurse-in-charge, containing only the number of patients treated. The total collections of all such slips would be transferred to P4 and the slips would be destroyed by him after that. Dr. Balram and the plaintiff did not request him to keep the slips. At the end of July, he said he showed them the two books. He was cross-examined further on the entries in P4. He had paid the contractor who renovated the Rahang clinic for RM18,000. He said from 1 July 1982, he had purchased drugs etc. and employed staff and all these expenses were mentioned in the missing book. He denied that Dr. Balram and the defendant had asked him for a joint banking account or for access to the partnership accounts. Dr. Balram asked him 3 or 4 days' medical leave, Dr. Balram was arrogant, and that on being told that if he (Dr. Balram) could not work as hard as he, he could leave, Dr. Balram left and filed a civil action against him and the plaintiff later. About the equipment supplied by Champion, the actual price was RM34,372 and that it was marked-up to RM43,000 and the difference was RM7,628 from which the said Champion company deducted RM1,322 and a cheque for RM6,306 was given to him and he had paid it to the bank account in the name of Leena Medical Centre, of which he was the only signatory. There was an agreement to open a joint partnership account but if only the partnership agreement had been signed. He agreed it was possible that he had opened an account in the Leena Medical Centre for the purpose of the cheque for RM6,306 made payable to Leena Medical Centre. He disagreed that the plaintiff was unaware of this. He maintained he was the sole proprietor. The tenancy was in the name of the defendant for the plaintiff to get a bank loan and this was his consent to the assignment of the tenancy to the plaintiff. He paid rent and the rent receipts were issued in the name of Leena Medical Centre. About the summons issued at the instance of Dr. Balram, the case was settled on the basis of remuneration claimed because Dr. Balram was not a partner because in turn of non-payment of "goodwill" money.

The total amount, the defendant said, paid to Dr. Balram was RM8,400 of which RM2,800 was a refund to Dr. Balram of the same amount, Dr. Balram paid towards expenses. He denied that the sum of RM6,300 from Champion was a fraud. This sum was not included in the accounts books because it was not an income but a "credit" extended to him. The defendant signed an "IOU" chit for RM18,000 which was a premium for the tenancy of Rahang clinic. The missing accounts book was important because it would show details of expenses incurred and also the sums contributed by him and the others. He closed the bank account in the name of Leena Medical Centre because the bank had informed him that the plaintiff had taken a bank loan also in the name of Leena Medical Centre.

I now set out the evidence of the defendant briefly. The defendant in his evidence stated he and the plaintiff met while in 1978 when they were serving as medical officers in Alor Star. He was later with the army. On 1 February 1982, he was transferred to Seremban as Medical Officer and he was staying with the defendant. Since his service with the government was coming to an end in 4 or 5 month's time he told the defendant of his intention to start a clinic. Through a friend called Tony, he managed to meet Thomas Ong, owner of some shop

houses in Rahang Road. On their way to a dinner, the plaintiff, he and the plaintiff's wife stopped at the shop house for a look at it. Thomas Ong asked the defendant later to see his father. He did most of the negotiating and he executed an "IOU" chit for RM18,000 being premium for tenancy to be paid by 6 half-yearly instalments. To account of the said sum of RM18,000 he had paid RM3,000. Thomas Ong took down his, and not the plaintiff's particulars, for the purpose of the tenancy agreement. The IOU chit was signed for RM15,000 after the payment of the said RM3,000 when he signed the tenancy agreement, the plaintiff was not present. He paid also RM4,600 for 3 month's rent deposit and one month's rent in advance. He said there was clause about sub-letting. He also took out a insurance policy against fire in his own name. The sum of RM7,600 he paid to Thomas Ong was a loan from the defendant.

He did not pay for board and lodging to the defendant because the plaintiff refused to accept the same as they were then on very good terms. He had taken another loan in the sum of RM2,770 for life insurance policy. He had since paid back this sum to the plaintiff but he discovered later that the defendant had paid on his behalf to the insurance agent, not the sum of RM2,770 but the sum of RM2,000 because of rebate. The plaintiff had not repaid him the difference of RM770.

He saw the bank manager for a loan for about RM30,000 and the manager required to be satisfied of a place for the medical practice, and two guarantors etc. He also saw the contractor for the renovation. He thought of having a 24-hour clinic and he decided to have a partner and he suggested it to the plaintiff who agreed to be a partner after a while and who also was to bring his Rembau and Rantau Clinic. The plaintiff told him that the Rantau and Rembau clinics were making about RM5,000 to RM6,000 a month and that the plaintiff would have to pay RM15,000 for a share of that profit. He said if Rahang clinic lost money, he would go back to the Rembau and Rantau clinics and would refund the said RM15,000 and this was to be in an agreement.

They had talked to Dr. Balram and Dr. Balram was to be given a share of the partnership, Dr. Balram's share being 30% while the rest was shared equally between the plaintiff and the defendant. The defendant further said that Dr. Balram was to pay RM25,000. It was agreed that partnership of the 3 would commence on 1 July 1982. Liabilities were to be borne equally. The partnership actually started on 1 July 1982. The tenancy of any of the 3 clinics was not discussed but partnership agreement was to be drafted by the plaintiff and that even if the partnership agreement was not ready, the partnership was to start on 1 July 1982.

The defendant further said it was agreed that the plaintiff, being experienced, was to manage all the clinics for the further 6 months and employment of staff and purchases would be by consultation among all partners and all 3 doctors would rotate in manning the clinics equally and that all future new clinic would be set up from partnership fund with same shares, and the losses had to be paid equally, otherwise the question of partnership was never discussed. The daily takings were to be paid to a joint partnership banking account as from 1 July 1982 and the name of the clinic would be Leena Medical Centre. The accounts books, for the first 6 months, were to be kept by the defendant in respect of income and expenditure to be made available to partners for checking purpose. He said he paid the rent for June 1982 for Rahang clinic and the receipt was in his name. He owed a total of RM11,520 to the plaintiff, made up of rent for the month of June, one month's rent in advance, 3 months' rent in deposit and life insurance premium. All the carpenter's expenses for renovation were to be borne by the partnership. Telephone agreement with the "Telecoms" was signed in his name, the defendant further said, the other bills were addressed to the landlord's name. Electricity bills

were issued initially in the landlord's name and LLN asked for further deposit, the defendant said he directed Thomas Ong to see the defendant, the managing partner, the electricity bills were issued thereafter in the name of the defendant.

The defendant further denied he was holding the tenancy in trust for the plaintiff and on 1 July 1982, the partnership commenced in the name of Leena Medical Centre at Jalan Rahang, and also two other clinics at Rembau and Rantau. The defendant said he was still in Government service and he helped in the evenings at Rahang clinic. There was no joint partnership bank account or partnership agreement (written). After the first two weeks, the defendant stayed put at Rahang clinic in violation of an earlier (rotation) agreement. All the daily takings were handed over to the plaintiff with slips containing the names of patients treated, their payments and the total amount collected. The takings were then counted and put in the drawer of the table to which the plaintiff alone had the key. The daily collections were entered in P4. The plaintiff told him the collections were paid into his personal bank account and despite being requested to open up a joint partnership account, the plaintiff did not do it. On 1 August 1982, the defendant said he started full time working in Leena Medical Centre. In addition to P4, there was another book for expenditure kept by the plaintiff. The defendant queried various items of expenditure and income. Dr. Balram had lot of quarrels about joint partnership bank account and written partnership agreement. On the summons issued against him and the plaintiff, he paid ½ of RM6,000 and also an extra sum of RM1,200 and costs of RM150 to Dr. Balram.

The defendant said x-ray machine was bought and application for the financing of the same was made to Sincere Leasing Company, and in such application signed by the defendant, the plaintiff made it an application from the partnership, giving the names of the defendant, the defendant and Dr. Balram as partners and a letter of guarantee and indemnity was each signed by all the three partners, and the sum asked for was RM42,000 and he found out that the actual price was RM34,372 a few days before the Court hearing started. The difference between the two sums was RM6,306 and the accounts books (P4) did not state that sum was received. This was a deliberate attempt; he said, by the defendant to hide his cheque for RM6,306 from him, because the document relating to refund of RM6,306 was "punch-holed", (i.e. not meant to be filed in usual file).

The defendant next referred to takings being paid into the plaintiff's saving account and personal bank account and the sum in question.

After Dr. Balram left, the defendant said they got another partner, *viz*. Dr. Ramanee who joined them in October 1982. At this juncture, the defendant said the plaintiff was demanding 51% share instead of 35%. A new draft (A22) was given by him which did not end in its being signed. The defendant said Dr. Ramanee "did not materialize as a partner". He left on 17 November 1982 saying that he would not report for work on 18 November 1982 and he told the defendant that he would be suing for his pay. On that day, the clinic at Mantin was closed. The defendant, through his solicitor, sent a notice of termination of partnership between him and the defendant, asking the defendant to quit from the premises where the Rahang clinic was. After this letter, the defendant said he had never worked at Rembau and Rantau Clinics, but he went to Mantin Clinic.

Dr. Ramanee saw the defendant telling the defendant that the plaintiff had paid Dr. Ramanee for locum work done at Rantau and directed Dr. Ramanee to see the defendant for "locum" work done at Rahang clinic. The defendant said he paid Dr. Ramanee for locum work done at Rahang clinic only, prior to the defendant's termination of partnership with the defendant. The defendant said he paid RM2,775.

After 18 December 1982, the defendant said he was only working at Rahang and Mantin clinics but he gave his daily takings in the usual way to the plaintiff because the plaintiff had given him an understanding that he would furnish the defendant with detailed accounts with a view to winding up the partnership.

After 18 December 1982 the defendant said the plaintiff and the defendant employed another locum, *viz*. Dr. Ragunathan who worked at Rantau and the defendant said he paid Dr. Ragunathan RM1,500. He also paid the 2nd instalment of a premium for the tenancy.

The defendant said Mantin clinic was set up with partnership fund on August 1982, and setting up Mantin clinic was, the defendant said, his idea. The tenancy agreement was signed in the name of the plaintiff. The plaintiff wanted to assign the tenancy of Mantin in exchange for that in Rahang, the defendant said. The defendant said the plaintiff had sent thugs to his clinic who had thrown the telephone at him, slashed the cushion (of his chair) in respect of which he had lodged a report, (D44).

On 28 December 1982, the defendant said he and the plaintiff had exchanges of words followed by the plaintiff taking a (surgical instrument) in one hand and an empty bottle in the other hand charging at him. The defendant said further that the plaintiff made a punctured wound on his right upper arm. Then the defendant became frightened, the defendant said, and made an incision on his own wrist, running to his neighbours screaming that the defendant had hurt him. The defendant said he then left and came back only on 5 January 1983.

On 5 January 1983, the defendant said he came back to Rahang clinic and there was a discussion between the plaintiff and the defendant during which, the plaintiff said, the plaintiff had suggested that the plaintiff would go back to Rembau and Rantau clinics and the defendant should have Rahang clinic and he would pay the defendant for ½ share of the Mantin clinic which the plaintiff would then take over. The defendant produced audited accounts in respect of Rahang clinic from the date he took over.

The defendant said he applied for his practising certificate in December 1982 for the year of 1983. He said he saw Thomas Ong 3 or 4 times before the tenancy agreement was signed. Thugs P4 (accounts book in respect of daily collections) was usually shown by the plaintiff to him at the end of the month and on certain occasions, P4 was left on the consultation table. The defendant was asked about question of purchase of drugs estimated to cost RM61,000 as shown in P22 and the defendant said that not all the drugs in such estimates were purchased, and the defendant further said the defendant did not consult him about the drugs. He said he applied for the bank loan on the basis that he was a sole proprietor but that there was a partnership then between him and the defendant in May 1982. He said he sent his application for bank loan with an estimate of requiring RM61,000 because the credits officer, Mr. Naidu asked him to do so. P23 was referred to him, and he said he gave stock in trade and fixtures as security.

The defendant said Dr. Balram had told him about his getting a loan to buy over Rantau clinic, and Dr. Balram had told the defendant also it was the main purpose of the defendant to get Dr. Balram to buy the unprofitable Rantau Clinic. The defendant denied that the defendant was trying to help Dr. Balram the same way he had helped the defendant. The defendant further said after his termination of the partnership between him and the defendant, he had no interest in the Rembau and Rantau clinics. The defendant said the plaintiff had told him there was no restraint of plaintiff's medical practice in Seremban from Dr. Vethaguru and he could not remember Dr. Vethaguru even protesting about the plaintiff practising in Rahang clinic.

The defendant said the said Tony Koh (who introduced Thomas Ong to the defendant) lived in the neighbourhood of plaintiff's house. He said he had told Thomas Ong that the plaintiff as managing partner was to pay the deposit asked for by LLN as he wanted the partnership to be the consumer with LLN and that the electricity bills were in plaintiff's name. He said further Dr. Ramanee did not become a partner, he was only paid. He said he only demanded accounts from the defendant verbally and not by letter. He said that it was agreed that Rahang clinic was his contribution towards the partnership, that was why he had to pay goodwill money of RM15,000 while Dr. Balram had to pay RM25,000 for a lesser share in the partnership.

The defendant denied that he would not be a partner till he paid up the goodwill money. He denied further that the signing of a partnership agreement was the prerequisite of the formation of the partnership. He denied that terms of partnership were still being negotiated as late as December 1982. He denied he had not put in a single cent until the bank loan was approved. He said he and Dr. Balram did not open a joint bank account because the daily collections were handed over to the plaintiff. He did not pay in the daily collections to a new account because all the staff were under the control of the defendant, and this was not his imagination. Dr. Timothy was recruited by the plaintiff and she became the defendant's wife later. It was when the bank loan was approved that he opened an account in the name of Leena Medical Centre for Rahang clinic. The defendant further said he didn't make copies of P4 after termination of partnership. The defendant said he didn't open the envelope which was sealed and which contained fees at Mantin because he trusted the defendant because he still continued to trust the defendant in turn because he gave the plaintiff the benefit of the doubt. The plaintiff's cousin, the defendant said, was keeping the collections for Rahang clinic. He said that the said cousin was on night duty and in the day time the nurse collected the fees. He said he set up Mantin clinic. He said when he left the government he did not have a clue about charging patients. He did not know whether the current account in the name of Leena Medical Centre opened by the defendant was closed because the defendant's application for a loan was approved. The plaintiff, the defendant and Dr. Balram applied for leasing of the equipment from Champion Electric, and D26 was the lease agreement. He and the plaintiff were operating Rahang clinic most of the day-time, and he was in Mantin clinic. He said the winding up would refer to the time before his termination of the partnership. The defendant had promised to give him accounts. He said he did not take complete control of the Rahang clinic till 5 January 1983. He never agreed to the plaintiff remaining in the Rahang clinic. The plaintiff resorted to using thugs but he did not take legal action because he did not want undue publicity. Thugs had slashed his chair cushions. He said that the cheque for RM6,306 for the refund went to the account of Leena Medical Centre, opened by the defendant. He denied the cheque was used for the purpose of our clinic. He did not know if the police had not taken action on a police report lodged by him. About those company clients - he said the defendant had never given the partnership credit. He did not know if it was the practice to send receipts for payments first before payments to these company clients. He had sent bills to "Seremban Bowl" since taking over the Rahang clinic.

After the termination, the plaintiff continued in his evidence, the defendant continued to be at Rahang clinic, for the purpose of winding up the office of the partnership. The plaintiff, he said, was collecting income from Rahang and all other clinics, but the plaintiff gave him an undertaking to give accounts. He was running both Rahang and Mantin clinics, spending his time equally between the two clinics. On 6 January 1983 he found the Mantin clinic closed by the defendant who had terminated the services of the nurses. He instructed for it to be reopened. He said the plaintiff got the consent of the landlord of the Mantin clinic premises to assign the tenancy to him as the plaintiff expected him to do/assign the tenancy at Rahang.

The defendant further said that when he took over Mantin clinic, it was doing badly because of 4 other clinics there, and medicines and drugs came from Rahang clinic daily. The only assets then were fixtures and fittings. He opened the account under the name of Leena Medical Centre with UAB because of the loan from UAB. The guarantors were the plaintiff's wife and Dr. Mahadevan, but he did not pay in daily collections into this account. He gave no permission to the plaintiff to substitute the plaintiff's name for the name of Thomas Ong with LLN but the first floor of the premises in Rahang Road was still in the name of the landlord for bills from LLN. He said he had paid RM2,700 in December 1982 for life insurance premium but the plaintiff's evidence in Court was RM2,000.

Having set out the important parts of evidence of the plaintiff and the defendant, I now deal very briefly with the important evidence of Dr. Balram who has figured prominently in the evidence.

Dr. Balram called by the plaintiff tended to corroborate the evidence of the defendant on the following points that there was a verbal agreement of partnership of the defendant, the defendant and himself commencing on 1 July 1982; that the shares of the partners for assets, liabilities and profit were 35% each for the plaintiff and the defendant; and 30% only for himself; that the goodwill money payable by the defendant was RM15,000 and by Dr. Balram, RM25,000, because of the defendant's contribution to partnership with Rahang clinic; that goodwill money was to be paid by 31 December 1982. Further Dr. Balram said however, such money must come from their respective shares of the profit; and that there was to be a joint bank account and daily takings were to be paid into it; that such joint account was never opened; that purchase of drugs was to be by joint and prior consultation; that takings were paid to bank account of the plaintiff; that the defendant owned the Rahang tenancy and the defendant, those, of Rembau and Rantau clinics, (but he said in May 1982 the question of tenancies was not discussed); that there was no written partnership agreement; that there should be a written agreement; that the defendant was evasive when asked about joint partnership account or partnership agreement; that collections had not been properly accounted for by the defendant; that the account book of expenditure was not properly kept by the defendant; that the price notified to Sincere Leasing was a marked-up price i.e. RM42,000, so marked up without his prior knowledge; that he filed a summons in Magistrate's Court against both the plaintiff and the defendant after he left the partnership because there was an exchange of words between him and the defendant first over the question of leave for himself, in which the defendant had asked him to leave. He was paid RM8,800 by both the plaintiff and the defendant in equal shares; out of this, RM2,800 was refund of money he paid to the plaintiff, and RM6,000 for damages.

In cross-examination, he said there was a private agreement between the plaintiff and himself (i.e. Dr. Balram) in which the plaintiff would sell his Rantau clinic to him. The agreement was used by him to apply for a bank loan, and it was something he could take back in the event" he lost his partnership". He said he was not sure if the defendant had told him that the defendant was applying for bank loan using a tenancy agreement. He came to know that the agreement to buy Rantau clinic, was a sham, after he consulted his own lawyer. The tenancy in each of Rantau and Rembau was in the plaintiff's name. He had withdrawn the loan application.

Dr. Balram further said that the sum of RM2,800 paid by him to the plaintiff was towards the cost of air-conditioning Leena Medical Centre as directed by the plaintiff. Yes, the sum of RM25,000 was meant for the plaintiff personally and the plaintiff had exclusive control in employment of staff. He agreed that in the Magistrate's Court, he had decided to accept RM3,000 pm. On the basis of salary plus the refund of RM2,800. He agreed that until the

agreement was signed, everything was temporary.

Among other things in re-examination, he said, about the equipments bought from Champion, he was not told the actual price as compared with the price of RM42,000. About D25 and D26, he was a partner of Leena Medical Centre.

The important witness called Thomas Ong, must next be dealt on. He was the son of the landlord of premises in Rahang Road, Seremban and negotiated with parties in this action for the tenancy of the said premises, apparently on behalf of his father. According to him, both parties saw him but he asked them which one was to rent the premises and the defendant said he was. He showed the draft of the tenancy agreement to the defendant, and not to the plaintiff, and the agreement was signed by the plaintiff and his brother. Plaintiff was abroad when the agreement was signed. It was the plaintiff who agreed with him about the premium, and 3 month's rent and it was the plaintiff and not the defendant who suggested to him about payment of the premium by instalments. The plaintiff was lying when the plaintiff said he was tenant and he had given the particulars to the plaintiff. The defendant gave him on IOU chit for RM15,000 being the premium and he was agent for the landlord. The defendant never requested him to assign the tenancy to the plaintiff and the defendant never told him that he had held the tenancy in trust for the defendant. He had instructions to collect the rent from the clinic, and he had collected rent from the plaintiff who was there. Sometime after January 1983, the plaintiff saw him 3 times with a lawyer asking me to assign the tenancy to the plaintiff. He did not agree. They threatened to report the absence of a receipt issued by the landlord for the premium paid to the income tax department. The premium instalments were paid by the defendant.

In cross-examination, Thomas Ong denied that the tenancy was put in the name of the plaintiff because the defendant wanted to borrow money from UAB (bank). He did not know who was to run the practice then. Both parties went to see the premises before the signing of the tenancy agreement. He agreed from July 1982 onwards, he collected the rent from the defendant but the defendant asked him to issue receipts in the name of Leena Medical Centre. He agreed that both the plaintiff and the defendant wanted to rent the premises and he told both parties that according to law, 2 persons could not hold the tenancy and he asked them as to which of them was to be the tenant. The contract with LLN, (deposit receipt from LLN) was in the plaintiff's name, because the plaintiff asked him to see the defendant.

Dr. Narinder Singh (PW1) said he took the plaintiff to meet the plaintiff partly at the request of the plaintiff. The plaintiff in his presence asked the defendant if the latter was interested. Among other things, the plaintiff told the defendant he would assist the plaintiff in getting a bank loan.

DW4 Karunanidhy, UAB accountant told the Court that there were 2 accounts opened by the plaintiff, one was in the name of Leena Medical Centre. There was an earlier bank account with the same name operated by the defendant. Both parties respectively described themselves as sole proprietor or proprietor of the said Leena Medical Centre.

DW5 Lakshamanan, a lawyer's clerk, was asked by Counsel for the plaintiff to go on a day in June 1983 to witness a locksmith brought by the plaintiff opening up a drawer. He saw the plaintiff take out a tape recorder, few cheque books and few personal letters counterchecked by the defendant. He later said the plaintiff had removed the accounts book.

DW6 Goh Team Siew, apparently a carpenter, said the defendant had asked him to have a look at the Rahang premises for renovation purpose. He asked for a sketch which was brought to him by both parties at the next meeting. Initial deposit of RM1,000 was paid by the plaintiff

to him and the defendant gave him the key to the premises. He also renovated the Mantin clinic and the plaintiff gave him instructions. All payments to him were made by the plaintiff. The plaintiff had asked him to mark up the price to RM60,000 from the sum of RM30,963.10 chargeable by him and he refused, partly because of tax problem. DW6 knew the defendant earlier and he had made furniture for the plaintiff's house in Seremban Gardens. He agreed that the plaintiff had even asked him to search for premises near Rahang to set up a clinic and he would be then asked to do renovation work. All in, the plaintiff paid him RM18,000 while the defendant paid him RM13,000.

From the evidence adduced at the trial and in particular, more relevant and material parts of such evidence as set out in all pages above and after observing the witnesses while they gave evidence, I make the following findings, on the balance of probabilities, to be numbered as follows, for ease of reference to them for guidance in connection with the implementation of the judgment to be given hereafter and for any consequential orders or directions for accounts and enquiries, that may be made hereafter:

(1) I find that the tenancy of the 1st and ground floors of premises known as 96, Rahang Road, Seremban, has been at all material times a personal asset of the plaintiff herein.

I need to pinpoint certain reasons for this finding. I have had to separate a great deal of chaff from the grain from the massive volume of evidence on this point, and this is the conclusion the Court comes to on the balance of probabilities. From such massive evidence, I have derived, in particular, assistance from the fact which I so find that the premium for the granting of the tenancy was agreed and that it was the plaintiff who executed an "IOU" chit for the balance sum of RM15,000 out of the total premium in the sum of RM18,000; this coupled with many other facts including the fact that the tenancy agreement was signed by the plaintiff in the name of the defendant without any qualification contained inside the tenancy agreement or in any separate agreement signed subsequently to provide for a declaration of trust by the plaintiff in favour of the defendant. It will be of interest to know that, more probably than not, the defendant must have been inhibited from demanding or wanting such a declaration of trust for fear of infringing the convenant restraining the defendant from setting up a medical practice in Seremban town, (Rahang Road being situated in or near the centre of Seremban town), as contained in clause 6 of the agreement which the defendant had signed with Dr. Vethaguru on 23 May 1981, (*vide* A3). I agree with submissions of his learned Counsel that that such restraint as imposed was void, but apparently the solicitor who drafted A3 and the defendant did not know such voidness until he had the benefit of more competent advice from his present Counsel subsequently engaged. I have refrained as much as possible from repeating or referring to other pieces of evidence set out above earlier. Further the plaintiff must have been complacent with the tenancy going to the plaintiff, knowing fairly well that the partnership then proposed, between him and the plaintiff and Dr. Balram, would be using the premises comprised in the tenancy in any event.

(2) I find, that in connection with the said premium totalling RM18,000, (the initial RM3,000 of which was paid by the plaintiff), it was the defendant who not only paid the said premium but also paid 3 months' rent deposit and one month's rent in advance totalling another sum of RM4,600 and that the said sum of RM3,000 and RM4,600 were money advanced by the defendant to the plaintiff, such sums being sums which the defendant can set off against any sum found due ultimately on any judgment hereafter from the defendant to the plaintiff.

(3) I find that there was a verbal and *de facto* partnership among the defendant, the defendant and one Dr. Balram as from 1 July 1982.

(4) I find that a partnership agreement in writing was not a condition precedent to the formation of the partnership but, having regard to all the circumstances, a mere form which all parties had decided to adopt.

(5) I find that the *de facto* partnership was not an illegal contract and that in this connection P50, being the annual practising certificate issued under s. 20 of the Medical Act 1971 fully authorised the plaintiff to practise medicine, irrespective of whether he did so at a government-owned hospital or in private practice and that that the need to notify change of place of such practising was merely discretionary and, not mandatory and any failure to notify such change, in no way would nullify the annual practising certificate.

(6) I find that the partnership was formed for an undefined time and that it was dissolved when Dr. R. Balram left and subsequently filed a civil action in Seremban Magistrate's Court, i.e. Civil Action No. 771/82 but thereafter, I find, that similar verbal and *de facto* partnership between the plaintiff and the defendant arose and continued also for an undefined time until the partnership between the continuing partners (viz. between the defendant and the defendant) was dissolved by the notice of termination of partnership dated 18 November 1982, please see ss. 32 and 34 of the Partnership Act 1961.

(7) I find that the original partnership among the plaintiff, the defendant and Dr. R. Balram was in the following proportions, i.e. 35% for the plaintiff 35% for the defendant and 30% for Dr. R. Balram.

Some comment on this finding will be necessary. I have found great assistance from the fact that when Dr. R. Balram in the said Magistrates Court Civil Action 771/82, had elected to accept in full settlement (in lieu of whatever was allegedly due to him as to be found on account of the partnership being taken, this Court taking note at the same time of the lack of jurisdiction of Magistrate to order the takings of account); a sum of RM3,000 pm as compensation/remuneration for 2 months, plus RM2,800 which he had paid earlier on account of the partnership, and that the defendant and the defendant had paid in equal shares, the said total sum of RM8,800 which Dr. Balram elected to accept in settlement.

(8) I find that after Dr. Balram left, the defendant and the defendant were equal partners for all purposes till their partnership was dissolved on 18 November 1982 and such partnership between the defendant and the defendant had for all the practical purposes in this case, commenced from 1 July 1982, as Dr.Balram had for all practical purposes ceased to have any bearing for all practical purposes in this case, as he had elected to accept and did receive a sum of RM8,800 in full settlement earlier.

(9) I find that from the evidence that the defendant and the defendant were partners only as to income and or profit and liabilities in two clinics, the Rantau clinic and Rembau clinic while all the assets of such two clinics have been personal assets of the defendant with the plaintiff allowing the use of such assets for the partnership.

(10) I find from the evidence that the plaintiff and the defendant were partners, not only of income and profit and liabilities, but also of all assets in two other clinics, i.e. Rahang clinic and Mantin clinic except their respective tenancies to be dealt with later.

(11) I find that the so-called good-will money agreed to be paid by Dr. Balram and the defendant had never been paid, and if it had been paid, I would have found that Balram and the plaintiff would have become partners as to assets, additionally, of the clinics at Rembau and Rantau. I find that such payment was not a condition precedent to be

formation of any partnership in this action.

(12) I find that the RM2,800 paid by Dr. Balram earlier and repaid by both the plaintiff and the defendant, was used in paying towards the cost of the air-conditioner in the Rahang clinic.

(13) I find that the parties had agreed for the defendant to be, in respect of all the clinics, solely in control of all collections and takings from patients, employment and dismissal of staff, purchase of drugs and medical equipments and appliances, renovations and repairs, all other expenditure, and keeping of all accounts of income and expenditure.

(14) I find therefore that the defendant should be the party liable to account for all income and expenditure, in respect of the matters mentioned in finding No. 13 above.

(15) I find that there was an agreement for the premises of the clinics at Rahang (road), Mantin, Rembau and Rantau to be used by the partnership with the partnership being liable for rent, renovations and repairs of such premises up to 18 November 1982.

(16) I find that on 18 November 1982, the partnership having been dissolved, the premises at Rahang Road, i.e. the premises of the Rahang clinic, vested in the defendant once more and the defendant became entitled to exclusive possession of the said premises, and similarly the premises at Rantau clinic and Rembau clinic began to vest, exclusively in the defendant as from 18 November 1982 with similarly exclusive possession thereof to the defendant, please see *Gian Singh & Co. v. Duraz Nahar,* [1965] 2 MLJ 12 and *Benlam v. Gray* [1847] 136 ER 827.

(17) I find, that the tenancy of the Mantin clinic had belonged to partnership until 18 November 1982 and therefore became the personal asset of the plaintiff.

Some comment is necessary also for the finding. Before 18 November 1982, the defendant unilaterally had closed down the Mantin clinic but the plaintiff had unilaterally reopened it. Further, I accept the evidence that the defendant wanted to assign the tenancy of the premises of Mantin clinic to the defendant, thus evincing a clear intention of the defendant to divest his interest in the said tenancy. The Court infers, from the evidence, that the plaintiff had decided to continue both the tenancy of the Mantin clinic and the operation of the Mantin clinic. Probably the Mantin clinic had not been a financial success that the parties, and more so the defendant, had expected it to be.

(18) I find that subject to what is stated elsewhere in this judgment, all income and expenditure shall be, with effect from 18 November 1982,

(a) in respect of Rembau and Rantau clinics, for the account of the plaintiff;

(b) in respect of Rahang and Mantin clinics for the account of the defendant.

(19) I find that that the refund of RM6,306 made by Champion Electro-Medical Sdn. Bhd. by cheque No. 707074 and received by the defendant should belong to the partnership i.e. the partnership between the defendant and the plaintiff; and I find no fraud had been proved beyond a reasonable doubt against the defendant in respect of this sum.

(20) I find that with effect from 18 November 1982, the defendant will have to pay entirely himself, all leasing instalments to the lessor-companies from which any medical equipment and appliances would have been leased, such medical equipment and appliances having been used in Rahang clinic and Mantin clinic according to terms of any leasing agreement.

(21) I find that in the Rahang and Mantin clinics, all moveable assets or chattels belonging

to the partnership as found herein, be, in default of agreement between the parties within six months from today, sold by public auction under the directions of the Registrar of the Court within 6 months from date of judgment, and pending this sale the plaintiff shall pay ½ of such reasonable rental per month to the defendant, and such reasonable rental to be assessed by the Registrar of the Court.

Having set out the above findings on issues for which determination by the Court appear to be sought, I shall say a few words about the order of costs I am to make. The rule as to costs in a partnership action is that in first instance, they are payable out of partnership assets. The extremely long hearing of this case was brought about by the stand taken by the defendant that the plaintiff was not a partner at all. I have also considered that the orders or remedies the Court is about to make or provide as the case may be, will be substantially within ambit of the alternative prayer of the statement of claim of the defendant and also the very remedies prayed for by the plaintiff though there was no counterclaim for same. I have also considered that because of the excessively long hearing of this case, an ordinary order for costs against the defendant could be ruinous to the defendant. All circumstances considered I will make only one order as to costs, i.e. for the plaintiff to pay 1/3 of the costs to be taxed, up to date of judgment and for further proceedings to be continued in chambers hereinafter.

I therefore give judgment as follows:

(1) This Court doth declare that a verbal partnership in equal shares had subsisted between the parties herein, subject to what is stated below, from 1 July 1982 until 18 November 1982 when it was dissolved.

(2) The Court doth declare that the said partnership was in respect of medical practices carried on under the name and style of Leena Clinic at Jalan Mahkamah, Rembau; at No. 23, Main Road, Rantau; at 66 Main Road, Mantin; and also at No. 96, Jalan Rahang, Seremban, all in the State of Negeri Sembilan.

(3) That the Court doth declare that such partnership was as to income only with equal liability to contribute to loss, if any, in the case of the medical practices at Rembau and Rantau; but in the case of medical practices at Seremban and Mantin, such partnership was to include all assets in addition to just income and the same liability to contribute to any loss, if any, subject also to what is otherwise stated below.

(4) The Court doth declare that the tenancy in respect of premises No. 96 Jalan Rahang has been at all material times and still remains the personal asset of the plaintiff and on the termination of the partnership between the parties hereto on 18 November 1982, exclusive possession of the said premises vested in the plaintiff.

(5) The Court doth declare that the tenancy in respect of each of the premises at Rantau and Rembau has at all material times been and still remains the personal asset of the defendant and exclusive possession vested in the defendant on 18 November 1982.

(6) The Court doth declare that the tenancy in respect of the premises at Mantin was a partnership asset until 18 November 1982 when it became the personal asset of the plaintiff in whom exclusive possession vested as from that date.

(7) That the affairs of the partnership be wound up.

(8) It is ordered that accounts and inquiries be taken before the Registrar of the Court, and that any money certified to be due consequently to each party be paid within 2 months, and there be the following directions in regard to such accounts and enquiries, with liberty to apply to each party for any further direction, in case the Registrar agrees.

(a) That the defendant be the accounting party;

(b) That the defendant do lodge in Court within 3 months from today accounts in form as provided or indicated in Rules of High Court, duly numbered consequtively and duly verified by affidavit to be sworn by the defendant; and further do notify the plaintiff that he has done so, and serve copy of the same on the plaintiff.

(c) That should the defendant wish to surcharge and falsify any item of such accounts, he must give notice to the defendant, and file the same in Court in the form indicated by the Rules of High Court within one month from the service of the accounts; giving grounds for such intended surcharging and falsifying;

(d) That within 1 month from the filing of such notice of intended surcharging and falsifying, that the Registrar do fix a date for the cross-examination of the defendant;

(e) That accounts and enquiries be conducted on the basis of, the numbered findings of facts or law as set out above in the written judgment which are binding on both parties hereto;

(f) That accounts or enquiries do cover income and expenditure, including the cost of renovation of clinics, acquisition of all medical equipments and appliances, rent payable in respect of all premises; the Registrar of the Court shall have the sole discretion to decide all questions arising therefrom and such party shall not seek further directions from the Judge unless the Registrar should agree.

(9) That in addition to accounts and enquiries hereby ordered to be taken, both parties be at liberty to apply to the Registrar, by consent only, for the appointment of a receiver (but not manager), at the cost or expense to be paid ultimately out of the partnership assets to the extent of 2/3 and to the extent of 2/3 by the defendant and in such event, the accounts of enquiries before the Registrar shall be adjourned sine die with liberty to apply generally to either party.

(10) That the plaintiff do pay 1/3 of the costs of action to be taxed in respect of costs incurred up to date of judgment and to be incurred for all subsequent proceedings to be continued in chambers.

Also found at [1988] 1 CLJ 493